

## Message Text

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ACTION L-03

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FM USMISSION GENEVA  
TO SECSTATE WASHDC 2995  
INFO USMISSION USUN NEW YORK

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E.O. 11652: N/A  
TAGS: ILC  
SUBJECT: REPORT ON RECENT SESSION OF THE UN INTERNATIONAL  
LAW COMMISSION

1. FOLLOWING COMMENTS BY SCHWEBEL ON MOST RECENT SESSION  
OF INTERNATIONAL LAW COMMISSION WHICH TOOK PLACE IN GENEVA  
MAY 8-JULY 28 MAY BE OF INTEREST.

2. THE COMMISSION DEVOTED THE BULK OF ITS TIME TO FOUR  
SUBJECTS: COMPLETION OF A FINAL, SECOND READING OF A  
DRAFT TREATY ON THE MOST FAVORED-NATION CLAUSE; AND  
ADOPTION OF FURTHER ARTICLES ON STATE RESPONSIBILITY, ON  
STATE SUCCESSION IN MATTERS OTHER THAN TREATIES, AND ON  
TREATY RELATIONS BETWEEN STATES AND INTERNATIONAL  
ORGANIZATIONS. A WORKING GROUP ALSO SURVEYED THE POSSIBLE  
ELEMENTS OF CONTENT OF A PROTOCOL WHICH WOULD ENHANCE THE  
IMMUNITIES OF THE DIPLOMATIC COURIER AND BAG. AFTER  
DISCUSSION, THE COMMISSION PLACED THE SUBJECTS OF STATE  
IMMUNITIES AND LIABILITY FOR ACTS NOT IN VIOLATION OF  
INTERNATIONAL LAW ON ITS ACTIVE AGENDA AND APPOINTED  
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RAPPORTEURS TO STUDY THEM.

3. MOST TIME WAS SPENT ON THE MFN TREATY BOTH IN PLENARY  
SESSIONS AND UNENDING MEETINGS OF DRAFTING COMMITTEE. THE  
DRAFTING COMMITTEE MET MORE OFTEN AT THIS THAN ANY  
SESSION OF COMMISSION IN ITS THIRTY YEAR HISTORY. THE  
SOVIET COMMISSION MEMBER, NIKOLAI USHAKOV, WHO

SPECIALIZES IN MAKING IT DIFFICULT FOR HIS COLLEAGUES, ESPECIALLY RAPORTEURS, THIS TIME WAS IN THE HOT SEAT AS SPECIAL RAPORTEUR. BY FAR THE MOST CONTROVERSIAL ISSUE WAS THE EFFORT OF THE EEC TO INSERT IN THE TREATY DRAFT A MFN EXCEPTION IN FAVOR OF CUSTOMS UNIONS. AGREEMENT TO DO SO WAS NOT REACHED; THE ISSUE WAS LEFT TO A DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES. BUT USHAKOV WAS JOLTED BY THE VIGOR OF THE EEC PUSH AND SUPPORT IT ATTRACTED FROM SOME LATIN AMERICAN AND ASIAN MEMBERS. THE OTHER CONTROVERSIAL ISSUE WAS WHETHER THERE SHOULD BE EXCEPTIONS FROM MFN IN FAVOR OF DEVELOPING COUNTRIES BENEFITING FROM GSP AND IN FAVOR OF DEVELOPING COUNTRIES IN TRADE BETWEEN THEM. PROVISIONS FOR BOTH WERE INSERTED BUT, IN BOTH CASES, AT SCHWEBEL'S INSTANCE, THEY WERE MADE SUBJECT TO RULES OF RELEVANT INTERNATIONAL ORGANIZATIONS, NOTABLY GATT. IN ALL, THE MFN TREATY WAS REDRAFTED TO IMPROVE THE CLARITY OF ITS TEXT CONSIDERABLY. SINCE, HOWEVER, IT WILL APPLY ONLY TO FUTURE MFN CLAUSES

IN CASES WHERE THE PARTIES TO SUCH CLAUSE ARE PARTY TO THIS TREATY AND DO NOT MODIFY OR EXCLUDE IT, THE PRACTICAL UTILITY OF THE MFN TREATY MAY BE LIMITED. THE SIXTH COMMITTEE OF THE NEXT SESSION OF THE GENERAL ASSEMBLY WILL HAVE TO DECIDE WHETHER TO CALL A CONFERENCE OF PLENIPOTENTIARIES IN ORDER TO REVISE AND ADOPT THE MFN LIMITED OFFICIAL USE

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ARTICLES AS A TREATY OR TO HAVE THEM OTHERWISE HANDLED, E.G., AS A MODEL CODE OF MFN INTERPRETATION ADOPTED BY THE ASSEMBLY. WHILE THE ILC RECOMMENDED THE FORMER, IT MAY WELL BE THAT THE U. S. SHOULD ADVOCATE THE LATTER.

4. THE DRAFT TREATY ON TREATY RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS PARALLELS THE VIENNA CONVENTION ON THE LAW OF TREATIES, WITH ADAPTATIONS FOR THE SPECIAL POSITION OF INTERNATIONAL ORGANIZATIONS. SEVERAL MORE ARTICLES WERE ADOPTED. ONLY ONE WAS THE FOCUS OF CONTROVERSY: A PROVISION THAT, WHERE THE CONSTITUENT INSTRUMENT OF AN INTERNATIONAL ORGANIZATION SO PROVIDES, TREATIES ENTERED INTO BY THAT ORGANIZATION BIND NOT ONLY THE ORGANIZATION BUT ITS MEMBERS. THIS OF COURSE IS THE CASE WITH THE EEC. USHAKOV VIRTUALLY ALONE (HE HAD SOME SUPPORT FROM AMBASSADOR SENJIN TSURUOKA OF JAPAN) OPPOSED INCLUSION OF THIS PROVISION. AS A RESULT OF HIS PROLONGED OPPOSITION, THE COMMISSION, ON ITS FIRST READING OF THE DRAFT, DECIDED TO INCLUDE THIS PROVISION IN BRACKETS. WHEN THE COMMISSION DECIDED TO EXTEND ITSELF THIS FAR TO ACCOMMODATE THE VIEWS OF A VERY FEW MEMBERS, SCHWEBEL PLACED ON RECORD HIS VIEW THAT, IN FUTURE CASES,

WHEN MEMBERS SOUGHT LIKE INDULGENCE, THEY EQUALLY WOULD  
BE ENTITLED TO IT (IN THE THOUGHT THAT, IF THERE IS TO BE  
A KIND OF VETO RIGHT, IT SHOULD NOT BE THAT OF THE  
SOVIET MEMBER ALONE).

5. THE COMMISSION DRAFT CONVENTION ON STATE RESPONSIBILITY  
EXPANDED WITH THE ADDITION OF FIVE NEW ARTICLES.  
ARTICLE 23, ON THE BREACH OF AN INTERNATIONAL OBLIGATION  
TO PREVENT A GIVEN EVENT, PROVIDES THAT, WHEN THE  
RESULT REQUIRED OF A STATE BY AN INTERNATIONAL OBLIGATION  
IS THE PREVENTION, BY MEANS OF ITS OWN CHOICE, OF THE  
OCCURRENCE OF A GIVEN EVENT (E.G., ASSAULT UPON A FOREIGN  
EMBASSY), THERE IS A BREACH OF THAT OBLIGATION ONLY IF,  
BY THE CONDUCT ADOPTED, THE STATE DOES NOT ACHIEVE THAT  
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RESULT. ARTICLES 24-26 CONCERN THE TIME OF COMMISSION

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OF THE BREACH OF INTERNATIONAL OBLIGATION. ARTICLE 27  
ADDRESSES THE COMPLICITY OF A STATE IN THE INTERNATIONALLY  
WRONGFUL ACT OF ANOTHER STATE. IT HOLDS THAT WHERE A  
STATE RENDERS ASSISTANCE TO ANOTHER STATE IN ORDER TO  
HELP THAT STATE COMMIT AN INTERNATIONAL OFFENCE, THIS

CONSTITUTES AN INTERNATIONALLY WRONGFUL ACT OF THE FORMER STATE EVEN IF THE FORMER STATE'S CONDUCT WOULD NOT OTHERWISE BE INTERNATIONALLY WRONGFUL. ALL OF THESE ARTICLES WERE ADOPTED WITHOUT SUBSTANTIAL CONTROVERSY. THE FINAL RENDERING OF ARTICLE 27 CLEARLY PROVIDES THAT THE STATES RENDERING ASSISTANCE MUST DO SO WITH THE INTENT THAT IT BE USEFUL FOR A WRONGFUL PURPOSE IN ORDER FOR THAT STATE TO BE IMPLICATED IN THE WRONGFUL ACT OF ANOTHER.

6. THE COMMISSION'S SPECIAL RAPPORTEUR ON STATES RESPONSIBILITY, PROFESSOR ROBERTO AGO, PROBABLY WILL BE ELECTED TO THE INTERNATIONAL COURT OF JUSTICE THIS YEAR, AFTER 22 INFLUENTIAL YEARS AS A MEMBER OF THE COMMISSION. IT REMAINS TO BE SEEN WHO WILL REPLACE HIM AS A SPECIAL RAPPORTEUR AND WHAT THE EFFECT OF A NEW MAN ON THE DRAFT LIMITED OFFICIAL USE

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ARTICLES WILL BE. THE UNFINISHED DRAFT, AS IT STANDS, HAS ITS DEFICIENCIES. WHERE IT IS NOT A RESTATEMENT OF THE OBVIOUS, IT OFTEN IS SO ABSTRACT AS TO RAISE QUESTIONS ABOUT ITS PRACTICAL UTILITY. WHERE IT IS INNOVATIVE AND RELATIVELY CONCRETE, IT MAY NOT ALWAYS BE SOUND, ESPECIALLY IN ITS DISTINCTIONS BETWEEN INTERNATIONAL CRIMES OF THE STATE AND INTERNATIONAL DELICTS OF THE STATE.

7. ON SUCCESSION OF STATES WITH RESPECTS TO MATTERS OTHER THAN TREATIES, THREE NEW ARTICLES WERE ADOPTED ON SUCCESSION TO STATE DEBTS. ARTICLE 23 PROVIDES THAT, WHEN TWO OR MORE STATES UNITE AND THUS FORM A SSSCESSOR STATE, THE STATE DEBT OF THE PREDECESSOR STATES SHALL PASS TO THE SUCCESSOR STATE; AND THAT, WITHOUT PREJUDICE TO THE FOREGOING PROVISION, THE SUCCESSOR STATE MAY, IN ACCORDANCE WITH ITS INTERNAL LAW, ATTRIBUTE THE WHOLE OR ANY PART OF THE STATE DEBT OF THE PREDECESSOR STATES TO THE COMPONENT PARTS OF THE SUCCESSOR STATE. THE LATTER PROVISION PROVOKED CONTROVERSY. THE JAPANESE AND SOVIET MEMBERS OF THE COMMISSION, WITH SOME SUPPORT, PRESSED TO AMEND IT TO PROVIDE THAT SUCH ATTRIBUTION COULD ONLY BE WITH THE CONSENT OF THE CREDITORS CONCERNED. ALTERNATIVELY IT WAS SOUGHT TO DELETE THE LATTER PROVISION IN TOTO. THE MAJORITY WISHES TO PRESERVE THE PROVISION UNAMENDED AS A CORRECT RENDERING OF ACTUAL STATE PRACTICE. ARTICLE 24 WAS RELATIVELY UNCONTROVERSIAL, IN PROVIDING THAT, WHEN PART OF THE TERRITORY OF A STATE SEPARATES, AN EQUITABLE PROPORTION OF THE STATE DEBT OF THE PREDECESSOR STATE SHALL PASS TO THE SUCCESSOR STATE. ARTICLE 25 PROVIDES THAT, WHEN A PREDECESSOR STATE DISSOLVES, AN EQUITABLE PROPORTION OF THE STATE DEBT OF THE PREDECESSOR STATE SHALL PASS TO EACH SUCCESSOR STATE. THESE DRAFT ARTICLES

HAD A SMOOTH PASSAGE FOR AT LEAST TWO REASONS. FIRST,  
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EARLIER ARTICLES HAD DEALT WITH THE ALLEGEDLY SPECIAL POSITION OF NEWLY INDEPENDENT STATES. SECOND, THE SPECIAL RAPPOREUR, ALGERIAN AMBASSADOR TO PARIS BEDJAOUI, IN 1978 AVOIDED LANDING HIS REPORT WITH GRATUITOUS ATTACKS UPON THE WEST - A WELCOME DEVELOPMENT WHICH, HOWEVER, PRESUMABLY FLEW FROM THE SUBJECT MATTER OF HIS 1978 REPORT AND NOT FROM ANY MODERATION OF HIS RADICAL OUTLOOK.

8. THE SESSION AS A WHOLE WAS LESS CONTENTIOUS AND MORE CONSTRUCTIVE THAN THE LAST. WHILE AGO CONFINED HIMSELF TO STATE RESPONSIBILITY, THE OTHER WESTERN MEMBERS WERE ACTIVE AND EFFECTIVE. IN 1977, SIR FRANCIS VALLAT TOOK REFUGE IN HIS CHAIRMANSHIP OF THE COMMISSION AND LEFT THE BATTLES TO SCHWEBEL. THIS YEAR, VALLAT WAS AGGRESSIVE AND TRENCHANT. RIPHAGEN (NETHERLANDS) WHO, IN 1977, WAS LARGELY AWAY AT THE LAW-OF-THE-SEA CONFERENCE, WAS PRESENT THIS YEAR AND EXTREMELY EFFECTIVE. REUTER(FRANCE) WAS HIS USUAL ELOQUENT, VITAL, CONSTRUCTIVE SELF. TSURUOKA PLAYED AN EXCEPTIONALLY ACTIVE AND USEFUL PART.

9. THIRD WORLD MEMBERS MADE NO SHOW OF UNITY AND TOOK A REFRESHING DIVERSITY OF POSITION. MOST, SUCH AS SUCHARITKUL (THAILAND), WHO WAS NAMED SPECIAL RAPPOREUR ON STATE IMMUNITIES, JAGOTA (INDIA), PINTO (SRI LANKA), CALLE Y CALLE (PERU) AND FRANCIS (JAMAICA), MADE HIGHLY PROFESSIONAL CONTRIBUTIONS.

10. THE "ENFANT TERRIBLE" OF THE COMMISSION REMAINED USHAKOV. HE DEMONSTRATED ANEW THAT HE SPENDS TWELVE MONTHS A YEAR ON COMMISSION WORK. HE WAS THE BEST PREPARED, MOST TALKATIVE, MOST AGGRESSIVE, AND PROBABLY MOST INFLUENTIAL MEMBER OF THE COMMISSION. ALL HE COULD NOT CARRY HE TRIED TO VETO. TO SOME (BUT ONLY SOME) EXTEND, HIS INTRANSIGENCE BOOMERANGED. IT CERTAINLY

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CAUSED WIDE RESENTMENT. THE IMPORTANCE WHICH THE USSR ATTACHES TO THE COMMISSION AND THE TREATIES IT DRAFTS IS STRIKING. E.G., WHILE THE UNITED STATES HAS SENT ONE LAWYER FROM L AND TWO CONSULTANTS TO THE CURRENT VIENNA CONFERENCE OF PLENIPOTENTIARIES ON STATE SUCCESSION IN RESPECT OF TREATIES, THE USSR HAS SENT A DELEGATION OF EIGHT PERSONS INCLUDING SIX PROFESSIONALS.

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## Message Attributes

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